Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term 1996

VIRGINIA WELLER,
Petitioner,

V.

CITATION OIL & GAS CORPORATION, et al.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a woman whose angry boss handed her a copy of a tract threatening "corporate warfare" against "the Spirit of Jezebel" -- a spirit "attracted to the uniqueness of the female psyche" in its "hatred for male authority" -- until "Jezebel is slain" had to prove that the harassment destroyed her opportunity to succeed in the work place to make out a case of a hostile work environment under Title VII of the Civil Rights Act of 1964.

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PETITION FOR WRIT OF CERTIORARI

Virginia Weller petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit that held she had failed to prove either a hostile work-environment or intentional infliction of emotional distress to the jury.

OPINIONS BELOW

The opinion of the court of appeals appears in 84 F.3d 191 (5th Cir. June 3, 1996), 1996 W.L. 257572, and Appendix A. The judgments of both the court of appeals and the United States district court also appear in Appendix A.

STATEMENT OF JURISDICTION

This case arose under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. The court of appeals entered its judgment on June 3, 1996 (App. A).

This court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

Title 42, U.S.Code, § 2000e-2.

Employment practices.

(a) It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

a. Statement of facts.

1. Weller's job with Citation

After working for several oil-and-gas companies following her divorce, Virginia Weller joined Citation Oil & Gas Corporation in August 1990 (3 Tr. 22-23). She served as one of three employees in Citation's contract administration department (2 Tr. 20, Pl. Exh. 6, p.1).

Her boss was Ralph Hollingshead (2 Tr. 20). He had interviewed her and offered her the job (2 Tr. 13). She made almost $40,000 a year. During their interview, he told her that two women had filed sexual harassment claims against him in the past (3 Tr. 10, 11. 11-25).

Weller testified that he was pleasant on certain days but in general "a very moody person" (2 Tr. 20, l. 8). Hollingshead told Weller later that he and his wife had argued because she would not accept his status as the head of the household (3 Tr. 20-21).

Hollingshead was a devout Christian who did not attend church regularly but did attend Bible classes at 6:00 a.m. three days a week in a local restaurant (3 Tr. 83, ll. 1-10). No women attended these meetings (3 Tr. 83, ll. 11-14).

2. Sale of U-gas

As part of her job, Weller had been tracking a supply of gas held by a pipeline company known as "U" gas (meaning "unaccounted-for gas") (2 Tr. 20-21). Hollingshead did not believe Citation owned the gas (3 Tr. 64). But after Weller's inquiries, the pipeline told her the volume was not a paper volume but actual gas that Citation could sell (2 Tr. 21). The value of the gas was some $485,000 (2 Tr. 22).

She proudly reported this windfall to Hollingshead, who told her to write him a memorandum (2 Tr. 22, ll. 8-16). In the meantime, a friend told the company's senior vice-president of Weller's find (2 Tr. 22-3).

The executive vice-president called Weller to congratulate her and also left a call for Hollingshead (2 Tr. 24). Hollingshead returned the call. Weller testified:

> A. [A]fter [Hollingshead] hung up, he came into my office, and he was furious.
>
> Q. What did he say?

> A. He made a comment that Jolene [Polson, her friend] wanted to make absolutely sure that I got the credit, and that he could assure me that it would never happen again, and he was furious.

(2 Tr. 24, ll. 12-18). Hollingshead spent most of the afternoon telling her not to violate the chain of command. Weller said she apologized four or five times (3 Tr. 93-94). "[H]e was obsessive, and it was uncalled for" (Tr. 93, ll. 5-6).

Weller went to work to find a buyer for the U-gas, which took four days (2 Tr. 25). She took the prices she had negotiated to Hollingshead's office (3 Tr. 96). "[H]e had been very cold and not spoken to me and glared and still seemed very angry for those four days," she testified (2 Tr. 26, ll. 5-7).

3. "The Spirit of Jezebel"

She noticed a religious book on Hollingshead's credenza, and he gave it to her to read (2 Tr. 26-27). She testified, "[I] was glad he was speaking to me again" (2 Tr. 27, l. 2). When she returned it the next day, she commented on its "unique thought" concerning John the Baptist (2 Tr. 27). Hollingshead said "the Spirit of Jezebel" had brought about the beheading of John the Baptist (2 Tr. 27). She testified:

> And he said, "You know about the Spirit of Jezebel, don't you?" And I said, "No, I don't." And he . . . leaned back, his

> briefcase was open, and he leaned back and he picked up an article. It was 12 pages . . . and . . . it was "Discerning the Spirit of Jezebel."

(2 Tr. 27, ll. 12-21). The article was actually a copy of several chapters of a book entitled THE THREE BATTLEGROUNDS, by a Francis Frangipane (3 Tr. 71). Hollingshead gave her the excerpts to read. She testified:

> When he handed it up to me, he looked me straight in the face, and in a cold, cold voice said, "The Spirit of Jezebel is alive today." And I took the article and went back to my office.

(2 Tr. 28, ll. 8-11). She began reading the excerpts in her office and recognized Hollingshead's handwriting and underlining on it. The excerpt said:

> When we speak of Jezebel, we are identifying the source in our society of unbridled sensuality, unbridled witchcraft and hatred for male authority.

(Tr. 32, Pl. Exh. 3).

> [J]ezebel is more attracted to the uniqueness of the female psyche in its sophisticated ability to manipulate without physical force.

> This spirit operates through women who, because of insecurity, jealousy or vanity, desire to control and dominate others. Jezebel is there behind the woman who publicly humiliates her husband with her tongue, and then thereafter controls him by his fear of public embarrassment.
>
> While she uses every means of sexual perversity known in hell, immorality is not the issue; *control* is what she seeks, using the power of sexual passions for the purpose of possessing men.

(2 Tr. 32-34, Pl. Exh. 3)(emphasis in original). The article counseled "war" against the Spirit of Jezebel:

> *If you war against Jezebel when you are tempted, eventually you are going to become dangerous!* This spirit will stop attacking you once it recognizes that your aggressive counterattack is setting other people free!

(Pl. Exh. 3, p. 101)(emphasis in original).

The book turned to the Biblical story of Jehu and Jezebel, which Hollingshead had underlined in several places (Pl. Exh. 3, pp. 104-109). According to the excerpt, Jehu rode into Jezreel and called up to the eunuchs to throw Jezebel down from her upper window (2 Tr. 36). The book said:

"So they threw her down, and some of her blood was sprinkled on the wall and on the horses, and he trampled her under foot (2 Kings 9:30-33 NAS/KJ)."

There was something in Jehu's spirit that we must possess today in our war against Jezebel. While we must be compassionate toward those captured by Jezebel, Jehu has no mercy, no hope for reform, no compromise or sympathy whatsoever towards this demonic spirit! Jehu "trampled her under foot." While she lay bleeding and near death, he finished her beneath the feet of his horse.

So also with us we must have no tolerance whatsoever for this spirit. *There can be no peace, no relaxing under our "fig tree", until Jezebel is slain!*

(2 Tr. 36-37, ll. 18-4, Pl. Exh. 3 p. 109)(emphasis in original). Hollingshead had underlined the phrases "no mercy, no hope for reform, no compromise or sympathy whatsoever toward this demonic spirit." (2 Tr. 34-37).

4. Weller's request for transfer.

Weller testified that the passage "frightened" her (2 Tr. 37, l. 6). So did another passage that promoted "warfare" against Jezebel (2 Tr. 42):

> As important as it is to win the war against Jezebel in the home, we must also join together for corporate prayer and warfare.
>
> . . . .
>
> **6. Those who engage in warfare should be trained and approved by church leadership.** Every church should have a "warfare team" as well as a "backup team" which prays for those on the front lines.

(2 Tr. 41-42, ll. 20-4, Pl. Exh. 3, pp. 119-20).

At first, Weller put the article in her desk drawer, but she believed that "not only did it give permission, but it encouraged and condoned and demanded violence against women" (2 Tr. 43, ll. 14-15). She testified she thought Hollingshead had directed the article against her personally (2 Tr. 101).

> I couldn't forget the article. I started shaking. My hands were shaking. It was too intense for me.

(2 Tr. 45, ll. 11-12).

Weller said nothing but continued to work for three weeks because she was "scared" and "didn't have enough strength" (3 Tr. 21, l. 20; 3 Tr. 22, l. 11). At length, she asked Hollingshead, "Do you think I'm a Jezebel?" Hollingshead did not respond (3 Tr. 76-78).

Weller went to a lawyer to find out whether she had the right to ask for a transfer (2 Tr. 45). Then, she asked the executive vice president for a transfer without any loss of pay (2 Tr. 45). After a series of meetings and letters, the president of the company ordered her to report back to work under Hollingshead (2 Tr. 46-55, Pl. Exh. 6,7). Instead, she resigned (Pl. Exh. 8).

b. Proceedings in the trial court.

Weller filed suit against Citation and Hollingshead on October 20, 1992. She based jurisdiction on Title VII of the Civil Rights Act of 1991, 42 U.S.C. § 2000e (R. 6). She also sued for intentional infliction of emotional distress under state law (R. 3).

After discovery, the trial court empaneled an eight-person jury to hear the evidence, and the trial began on November 16, 1993 (R. 533). After a four-day trial, the trial judge entered judgment on the jury verdict for $310,000, which included punitive damages capped under 42 U.S.C. § 2000e (App. A).

c. Reversal by the court of appeals.

The court of appeals observed that the excerpts "contained an intense religious diatribe," and said Weller "believed that Hollingshead intended the material as a comment on her assertiveness at work." 84 F.3d at 193, App. A. All the same, relying on circuit precedent, the court of appeals reversed the judgment on the ground of insufficient evidence. The court held:

> Title VII was only meant to bar conduct that is so severe and pervasive that it destroys a protected classmember's opportunity to succeed in the work place [*citing DeAngelis v. El Paso Municipal Police Officers Ass'n*, 51 F.3d 591, 593 (5th Cir.), *cert. denied*, __ U.S. __, 116 S.Ct. 473 (1995).] Viewing the evidence in the light most favorable to the verdict, the jury could have reasonably inferred that Hollingshead meant the article as retributive epithet -- that Hollingshead remained angry at Weller and that he was calling her a "Jezebel." . . . We therefore hold that it was unreasonable, on the evidence presented, for the jury to find that Hollingshead's conduct created a hostile work environment.

Weller v. Citation Oil & Gas Corp., 84 F.3d 191, 194-95 (5th Cir. 1996)(App. A). Weller did not move for rehearing.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE FIFTH CIRCUIT'S RULE THAT SEX DISCRIMINATION MUST DESTROY AN EMPLOYEE'S OPPORTUNITY TO SUCCEED IN THE WORKPLACE TO CREATE A HOSTILE ENVIRONMENT IGNORES THIS COURT'S HOLDING THAT A JURY MAY LOOK TO ALL THE CIRCUMSTANCES OF THE HARASSMENT.

A. This court has held unanimously that no single consideration determines a violation of Title VII.

The court should grant certiorari in this case because the lower court has set aside a jury verdict in reliance on circuit precedent that contradicts the holding in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, ___, 114 S.Ct. 367, 371 (1993).

This court has spoken twice to give broad definition to what constitutes a hostile or abusive work-environment. Both times the court has spoken unanimously. *Harris v. Forklift Systems, Inc., supra,*; *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). Employees throughout the nation have come to rely on the rules expressed in these decisions.

Since the *Forklift* opinion, the courts of appeals have decided more than two dozen cases in which employees alleged a hostile work-environment. More than 150 reported Federal cases have cited the *Forklift* opinion. Most of the circuits have applied the test of a hostile

work-environment broadly, although there has been some confusion in the lower courts. In this rapidly developing jurisprudence, this court should not allow the Fifth Circuit to place an unacceptable gloss on the statute.

B. The Fifth Circuit court of appeals has added a new requirement of destruction of opportunity to this court's Forklift *holding.*

This court should grant certiorari because in reversing this jury verdict, the court of appeals added a new requirement to the holding of *Harris v. Forklift Systems.* The court of appeals held that to be actionable, Hollingshead's conduct had to destroy Weller's ability to succeed in the workplace. *Weller v. Citation Oil & Gas Corp.*, 84 F.3d at 194-95.

But the *Forklift* court held that "no single factor is required" to find an environment abusive. In fact, this court granted certiorari in the *Forklift* case to reject the Sixth Circuit's gloss that actionable conduct had to seriously affect a plaintiff's psychological well-being. 114 S.Ct. at 371.

The *Forklift* opinion nowhere mentions "destruction" of the employee's opportunity to succeed in the workplace. Justice Scalia's concurring opinion in that case concluded that the statute does not even restrict violations to unreasonable interference with performance at work, let alone destruction of the opportunity to succeed:

> One of the factors mentioned in the Court's nonexhaustive list -- whether the conduct unreasonably interferes with an employee's work performance -- would, it if were made an absolute test, provide greater guidance to juries and employers. But I see no basis for such a limitation in the language of the statute.

114 S.Ct. at 372.

Yet the court of appeals -- relying on its own mistaken circuit precedent -- built out of the *Forklift* opinion a brand-new test of "destruction" of the ability to succeed:

> Title VII was only meant to bar conduct that is so severe and pervasive that it destroys a protected classmember's [sic] opportunity to succeed in the workplace.

84 F.3d at 194, *citing DeAngelis v. El Paso Municipal Police Officers Ass'n*, 51 F.3d 591, 593 (5th Cir.), *cert. denied*, __ U.S. __, 116 S.Ct. 473 (1995).

Not only did the court of appeals create a new test that this court has rejected, the lower court changed the meaning of this court's opinion. The court of appeals mistakenly concluded that a single incident did not amount to "severe and pervasive conduct." *Id.* n.5. The words this court actually used were "severe *or* pervasive." 114 S.Ct. at 370. A plaintiff does not have to prove both elements.

Under the *Forklift* holding, Hollingshead's diatribe against women surely qualifies as [1] a severe physical threat against Weller [2] that did in fact affect her mental well-being. The jury heard that evidence. Those are two of the circumstances this court held would justify a jury verdict. 114 S.Ct. at 371. Weller reasonably believed the tract "encouraged and condoned and demanded violence against women," herself included (2 Tr. 43, ll. 14-15). An employee should not have to wait for murder or assault to make out a case of a hostile work-environment.

Weller presented ample evidence about the conduct of her superior to go the jury under Title VII. We urge this court to grant certiorari to conform the law in the Fifth Circuit to the national rules laid down by this court.

C. The court of appeals misread the evidence when it decided that the supervisor had only used an epithet against a woman employee.

The court of appeals completely misinterpreted this jury verdict by labelling an implied threat of violence against an aggressive female employee as a mere "epithet." The jury quite properly decided otherwise.

Hollingshead was not just calling Virginia Weller a Jezebel, he was threatening her with violence. His fundamentalist tract called for "warfare" against "feminists" who are fiercely independent, intensely ambitious, and hate male authority. In this era of weapons in the workplace, no woman can ignore the threats of a boss like Hollingshead.

Hollingshead underlined the passage,

> Jehu has no mercy, no hope for reform, no compromise or sympathy whatsoever towards this demonic spirit! Jehu "trampled her under foot." While she lay bleeding and near death, he finished her beneath the feet of his horse.

Hollingshead did not just call Weller a Jezebel, he frightened her with the intensity of his hatred for feminists. That is why she shook for weeks after their encounter. If she refused to adopt a meek and submissive attitude, she reasonably feared he would decide to treat her the way Jehu treated Jezebel. Weller's friend at work, Jolene Polson, agreed in her testimony that the tract promoted violence toward women "who were thought to have the spirit of Jezebel" (3 Tr. 58, l. 4-6).

Under this court's holding in *Harris v. Forklift Systems,* Weller made out an overwhelming case of abusive work-environment for the jury.

II. THIS COURT SHOULD GRANT CERTIORARI TO FORESTALL CONFUSION AMONG THE CIRCUITS OVER THE SCOPE OF THE *FORKLIFT* OPINION.

A. Other circuits have taken a different view of the evidence required to reach a jury than the Fifth Circuit's.

Under the precedents in most other circuits, Weller's case would have no trouble reaching a jury. The lower courts are dealing constantly with cases of hostile

work-environments in which they place the requirements of proof much lower than does the Fifth Circuit.

In *Carr v. Allison Gas Turbine Div., General Motors*, 32 F.3d 1007 (7th Cir. 1994), the plaintiff was the first woman in the tinsmith shop and subjected to constant obscenities and sexual pranks. *Id.* at 1009-10. The district judge held that the harassment did not affect her because of her poor attendance.

The court of appeals reversed, with Judge Posner writing the opinion. Here is how he expressed the *Forklift* standard:

> All she need show is that her conditions of employment were adversely affected. If because she was a woman General Motors had turned down the heat at her work station in order to make her uncomfortable, that would be actionable sex discrimination, even if the discomfort inflicted was too mild to be described as "suffering."

Id. at 1011, *citing Harris v. Forklift Systems*, 114 S.Ct. at 370-71. Even in reversing a jury, Judge Posner has been "mindful of the dangers that lurk in trying to assess the impact of words without taking account of gesture, inflection" and other elements of context. *Baskerville v. Culligan International Co.*, 50 F.3d 428, 431 (7th Cir. 1995); *see Dey v. Colt Construction & Development Co.*, 28 F.3d 1446, 1455-56 (7th Cir. 1994).

The Ninth Circuit has given a similar interpretation. In *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (1994), the court held that a blackjack operator subjected to a constant stream of obscene abuse by a male supervisor had proven sexual harassment:

> It is enough . . . if such hostile conduct pollutes the victim's workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay on in her position.

Id. at 1463.

The Eighth Circuit has found sexual discrimination where a doctor abused women nurses more than men, even though the abuse was not "explicitly sexual." *Kopp v. Samaritan Health System, Inc.*, 13 F.3d 264, 269 (1993). The same court has held that intimidation and hostility to women can result from conduct other than sexual advances. *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316 (8th Cir. 1994).

The Third Circuit agreed with the Eighth Circuit's rule in a case in which a superior constantly demanded loans from a Federal EEOC investigator. Their repeated meetings provoked rumors of an affair that stifled her chances of promotion. *Spain v. Gallegos*, 26 F.3d 439, 451 (1994).

The Fourth Circuit has interpreted the *Forklift* case as posing "quintessentially a question of fact" for the jury. *Beardsley v. Webb*, 30 F.3d 524, 530 (1994). That court has even extended the *Forklift* rule to an Iranian man who

resigned his job as an engineer at a nuclear power plant after repeated insults and names such as "camel jockey," "the local terrorist," and "the Emir of Waldorf," the town in which he lived. *Amirmokri v. Baltimore Gas and Elec. Co.*, 60 F.3d 1126 (1995).

Where five women complained of inappropriate touching and remarks by an Army civilian, the Federal Circuit concluded that the women did not have to prove impairment of their job performance.

> The criterion is not what a reasonable woman employee is capable of enduring, but whether the offensive acts alter the conditions of employment.

King v. Hillen, 21 F.3d 1572, 1583 (1994). The Tenth Circuit agreed with this rule in the case of a telephone operator subjected by a male operator to constant propositions and grabbing. *Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777, 782 (1995).

None of these courts would have reversed Weller's jury verdict on the ground that Hollingshead's threats did not destroy her ability to succeed in the workplace.

B. The Second Circuit has agreed with the Fifth Circuit that a single offense other than sexual assault will not support liability for a hostile work-environment.

The Second Circuit has taken a less expansive view of the statute than most of the other circuits. A female account manager in an environmental services company sued after her firing on the grounds that her three co-

workers had directed obscene sexual comments toward her and then raped her after a business dinner. The court of appeals held that "even a single incident of sexual assault" creates an abusive work-environment.

But for verbal abuse, the court said, "[i]n order to be actionable, the incidents of harassment must occur in concert or with a regularity that can reasonably be termed pervasive." *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (1995). Of course, Hollingshead did not subject Weller to verbal abuse so much as to threats of violence if she continued to usurp male authority.

CONCLUSION

The court should grant certiorari and reverse the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served three copies this document personally or by mail on each party to the proceeding at or before the time for filing by serving their counsel of record.

_____

ROY L. BARNES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VIRGINIA WELLER,

Plaintiff.

CIVIL ACTION
NO. H-92-3240

VS.

CITATION OIL & GAS CORP.
AND RALPH HOLLINGSHEAD,
Defendants.

JURY TRIAL DEMANDED

FINAL JUDGMENT

On the 16th day of November, 1993, came on to be heard the above entitled and numbered cause and Virginia Weller, the Plaintiff, appeared in person and by attorney

of record and announced ready for trial and Citation Oil & Gas Corp., as well as Ralph Hollingshead, the Defendants, appeared in person and by corporate representative and by attorney of record, and announced ready for trial. At the conclusion of the evidence, the Court submitted the issues in the case to the jury. The verdict of the jury against the Defendants was that:

1. Defendants, Ralph Hollingshead and Citation Oil & Gas Corp., sexually harassed Virginia Weller;

2. Virginia Weller was constructively discharged;

3. Defendants Ralph Hollingshead and Citation Oil & Gas Corp., intentionally inflicted emotional distress upon Virginia Weller.

4. Defendants, Ralph Hollingshead and Citation Oil & Gas Corp., engaged in the sexual harassment of Virginia Weller with malice or with reckless indifference to the federally protected rights of Virginia Weller; and

5. Defendants, Ralph Hollingshead and Citation Oil & Gas Corp., willfully or maliciously engaged in the intentional infliction of emotional distress.

It is hereby ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff, Virginia Weller, have and recover damages from the Defendants, Ralph Hollingshead and Citation Oil & Gas Corp., as follows:

1. Forty Thousand Dollars ($40,000.00) for intentionally inflicted emotional distress;

2. Twenty Thousand Dollars ($20,000.00) for past pecuniary loss.

3. Ten Thousand Dollars ($10,000.00) for past compensatory damages.

4. Prejudgment interest on the amounts described in (1), (2), and (3) from January 12, 1993, which is 180 days after Defendants received notice of Plaintiff's claim in the form of an Equal Employment Opportunity Commission charge. Prejudgment interest will be assessed at the rate of 5.02 percent (equal to post-judgment interest) and will be compounded daily as provided by state law.

5. Twenty Thousand Dollars ($20,000.00) for future pecuniary loss.

6. Eighty Thousand Dollars ($80,000.00) for punitive damages for the willful or malicious intentional infliction of emotional distress.

7. One Hundred Thousand Dollars ($100,000.00) for future pecuniary loss, future compensatory damages and punitive damages for malicious, or with reckless indifference, sexual harassment. Although the jury awarded more money for these damages, such damages are capped by statute (42 U.S.C. 2000e et seq.) at $100,000.00 for a respondent with more than 100 employees and fewer than 201 employees.

It is further Ordered that Plaintiff, Virginia Weller, recover from the Defendants, Ralph Hollingshead and Citation Oil & Gas Corp., attorney's fees in the amount of Forty Thousand Dollars ($40,000.00) for services

rendered in preparing and presenting this case for trial. This award of attorney's fees is part of the judgment here rendered.

It is further ORDERED that the judgment here rendered shall bear interest at the rate of 5.02 percent, as provided by law, from May 17 1994 the date of judgment, until paid.

All taxable costs of Court expended or incurred in this case are adjudged against the Defendants, Ralph Hollingshead and Citation Oil & Gas, Corp. All writs and processes for the enforcement and collection of this judgment or the costs the Court may issue as necessary. All other relief not expressly granted is denied.

SIGNED on this the 17 day of May, 1994,

/s/DAVID HITTNER
Judge Presiding

APPROVED AS TO FORM:

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ATTORNEYS FOR DEFENDANTS, RALPH HOLLINGSHEAD AND CITATION OIL & GAS CORP.

1994

Virginia WELLER, Plaintiff-Appellee,
v.
CITATION OIL & GAS CORPORATION, and Ralph Hollingshead, Defendants-Appellants.

No. 94-20439.

United States Court of Appeals,
Fifth Circuit.
June 3, 1996

Before GARWOOD, EMILIO M. GARZA and DEMOSS, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Defendants Citation Oil & Gas Corporation ("Citation") and Ralph Hollingshead appeal a jury verdict awarding plaintiff Virginia Weller damages on her employment discrimination claims. We reverse.

I

Weller worked as a Contract Administrator in Citation's Contract and Marketing Department. The department consisted of Weller, her supervisor Ralph Hollingshead, and one other female employee. Through Weller's work monitoring natural gas stored in the El Paso Natural Gas Pipeline, Weller discovered that Citation owned a

quantity of gas which was not reflected in Citation's records. Before completing a memorandum to Hollingshead detailing her discovery, Weller informed the Executive Vice President's secretary about the gas. When the Executive Vice President phoned Hollingshead to discuss the discovered gas, Hollingshead was "caught off guard" and was unprepared to explain the status of the gas. Hollingshead's superiors reprimanded him, and in turn, Hollingshead reprimanded Weller for ignoring proper channels. According to Weller, the reprimand was unnecessarily harsh. During the next four days, Weller testified that Hollingshead seemed angry and did not speak to her.

Shortly thereafter, Hollingshead loaned Weller a religious children's book about angels. Weller testified that she was glad they were speaking again. Upon returning the book the next day, Weller told Hollingshead that the book presented a "unique thought" on the subject of angels. [FN1] Hollingshead and Weller proceeded to have a short conversation about the death of John the Baptist, and how a woman, possessed with a spirit called "Jezebel," danced when John the Baptist was beheaded. Hollingshead then gave Weller some excerpted chapters from The Three Battlegrounds, a book by Francis Frangipane. According to Weller, she felt "anger" and "coldness" coming from Hollingshead when he handed her the article. As he handed her the material, Hollingshead stated "the Spirit of Jezebel is alive today."

The excerpted material Hollingshead gave Weller contained an intense religious diatribe concerning the "Spirit of Jezebel," a "controlling" and "manipulative" spirit bent on "corrupting" society and turning it away from a fundamentalist understanding of the teachings of Christ. [FN2] According to the excerpt, the Spirit of Jezebel "is without gender," yet prefers to work through women because of the "uniqueness of the female psyche in its ability to manipulate without physical force." [FN3] The excerpt encourages its readers to "do battle" against the Spirit of Jezebel in order to maintain a fundamentalist Christian order.

Weller was deeply offended by the excerpt's contents. She believed that Hollingshead intended the material as a comment on her assertiveness at work. Three weeks later, after consulting an attorney, Weller concluded that she could no longer work with Hollingshead. She complained to Citation officials and requested a transfer. Citation officials made an inquiry into the incident and reprimanded Hollingshead but were unable to transfer Weller. Citation officials told Weller that they had spoken to Hollingshead and anticipated no further problems if she would return to work. After several weeks of negotiations, she resigned. Weller filed suit against Citation and Hollingshead, asserting claims for sexual harassment, constructive discharge, and intentional infliction of emotional distress. A jury found in her favor and awarded damages on all claims. Defendants now appeal the jury verdict. —

II

The defendants argue that Weller presented insufficient evidence to support the jury's verdict. In reviewing a case for sufficiency of the evidence, we consider all the evidence presented, not just the evidence supporting the verdict, but in the light most favorable to, and drawing all reasonable inferences in favor of, the party who obtained the verdict. Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir.1969) (en banc). We will reverse only if reasonable minds exercising impartial judgment could not have arrived at the verdict. DeAngelis v. El Paso Municipal Police Officers Ass'n, 51 F.3d 591, 594 (5th Cir.), cert. denied, ____ U.S. ____, 116 S.Ct. 473, 133 L.Ed.2d 403 (1995).

To state a claim for relief under Title VII [FN4] for gender discrimination based on a theory of a hostile work environment, a plaintiff must prove (1) that she belongs to a protected class, (2) that she was subject to unwelcome harassment, (3) that the harassment was based on sex, (4) that the harassment affected a term, condition or privilege of employment, and (5) that the employer knew or should have known about the harassment and failed to take prompt remedial action. Nash v. Electrospace System, Inc., 9 F.3d 401, 403 (5th Cir.1993). Sexually discriminatory verbal intimidation, ridicule, and insults may be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment violative of Title VII. Harris v. Forklift Systems, Inc., 510 U.S. 17, ---, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993). In order to be actionable, however, the challenged conduct must create an environment that a

reasonable person would find hostile or abusive. Id. Whether an environment is hostile or abusive depends on a totality of circumstances, focusing on factors such as the frequency of the conduct, the severity of the conduct, the degree to which the conduct is physically threatening or humiliating, and the degree to which the conduct unreasonably interferes with an employee's work performance. Id. at —, 114 S.Ct. at 371. We have previously noted that the " 'mere utterance of an epithet which engenders offensive feelings in an employee' " is insufficient, without more, to support Title VII liability. DeAngelis, 51 F.3d at 595 (quoting) Meritor Savings Bank v. Vinson, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986)).

Citation and Hollingshead argue that giving the Spirit of Jezebel excerpt to Weller was insufficient to support the jury's finding of hostile work environment. We agree. Title VII was only meant to bar conduct that is so severe and pervasive that it destroys a protected classmember's opportunity to succeed in the workplace. DeAngelis, 51 F.3d at 593. Viewing the evidence in the light most favorable to the verdict, the jury could have reasonably inferred that Hollingshead meant the article as retributive epithet--that Hollingshead remained angry at Weller and that he was calling her a "Jezebel." [FN5] We do not doubt that Weller was deeply offended by the article. However, we note that making actionable "conduct that sporadically wounds or offends but does not hinder a female employee's performance, would not serve the goal of equality." Id. Instead, a lesser standard "would attempt to insulate women from everyday insults as if they remained models of Victorian reticence." Id. Such a result is not the goal

of Title VII. Id. We therefore hold that it was unreasonable, on the evidence presented, for the jury to find that Hollingshead's conduct created a hostile work environment. [FN6] Accordingly, we reverse the jury's verdict awarding Weller damages under a hostile work environment theory. [FN7]

III

The defendants next contest the jury's award for intentional infliction of emotional distress. Under Texas law, intentional infliction of emotional distress requires proof (1) that the defendant acted intentionally or recklessly, (2) that the defendant's conduct was extreme and outrageous, (3) that the defendant's actions caused the plaintiff emotional distress, and (4) that the emotional distress suffered by the plaintiff was severe. Dean v. Ford Motor Credit Co., 885 F.2d 300, 306 (5th Cir.1989). Conduct is "outrageous," for purposes of an intentional infliction of emotional distress claim, "if it surpasses all bounds of decency, such that it is utterly intolerable in a civilized community." Ugalde v. W.A. McKenzie Asphalt Co., 990 F.2d 239, 243 (5th Cir. 1993) (internal quotation marks omitted). We have previously stated, in affirming summary judgment for a defendant on an intentional infliction of emotional distress claim, "Liability does not extend to mere insults, indignities, threats, annoyances, or petty oppressions." Id. at 243.

Citation and Hollingshead argue that the evidence was insufficient to support Weller's claim of intentional infliction of emotional distress. After carefully reviewing the evidence in the light most favorable to the

verdict, we conclude that Weller presented insufficient evidence to support the jury's verdict for intentional infliction of emotional distress. The Jezebel excerpt may have been hurtful and offensive, but intentional infliction of emotional distress requires evidence of conduct beyond mere insults, indignities, or petty oppressions. Id. Weller failed to present such evidence. Therefore, it was unreasonable for the jury to conclude that Hollingshead's conduct was sufficiently "outrageous" to support an intentional infliction of emotional distress claim. See Ugalde, 990 F.2d at 243 (holding employer's repeated references to an Hispanic employee as "wetback" insufficiently outrageous and extreme to support a claim for intentional infliction of emotional distress). Accordingly, we reverse the jury's verdict on Weller's claim of intentional infliction of emotional distress. [FN8]

IV

For the foregoing reasons, we REVERSE and RENDER judgment in favor of the defendants.

FN1. Weller testified that she was not offended by this book.

FN2. The article states, "When we speak of Jezebel, we are identifying the source in our society of obsessive sensuality, unbridled witchcraft and hatred of male authority."

FN3. The article states, "let us recognize that this demon can also operate through men. In fact, Jezebel seeks the highly refined qualities of the professional

musician...." The article continues that the spirit "flows unhindered throughout the entertainment industries. It flaunts itself in the world of fashion; it holds degrees in the philosophical departments of our schools and colleges."

FN4. 42 U.S.C. § 2000e-2.

FN5. It is undisputed that the Jezebel excerpt was an isolated incident in an otherwise satisfactory work relationship.

FN6. In DeAngelis, we noted the yet unresolved dilemma facing courts adjudicating claims at the intersection of Title VII and the First Amendment: Where pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech. DeAngelis, 51 F.3d at 598-99. Supreme Court precedent in this area provides little guidance concerning whether conduct targeted for its expressive content, like Hollingshead's conduct in this case, may be regulated under Title VII. See Wisconsin v. Mitchell, 508 U.S. 476, 485-87, 113 S.Ct. 2194, 2200, 124 L.Ed.2d 436 (1993) (holding that conduct not targeted on the basis of its expressive content may be regulated under Title VII). Because we find that the evidence was insufficient to support the jury's verdict, we leave this troubling question for another day.

FN7. Because Weller failed to present sufficient evidence to support her hostile work environment claim, her constructive discharge claim necessarily fails as well. See Landgraf v. USI Film Prods., 968 F.2d 427, 429 (5th Cir.1992), affirmed, ____ U.S. ____, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) ("To prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile work environment."). We also need not address whether the jury properly held Hollingshead personally liable under Title VII. See Grant v. Lone Star Co., 21 F.3d 649, 650 (5th Cir.) (refusing to hold who does not qualify as an "employer" under Title VII, personal liable for creating hostile work environment), cert. denied, ____ U.S. ____, 115 S.Ct. 574, 130 L.Ed.2d 491 (1994). Nor need we address Citation's claim that the company took sufficient remedial steps to insulate itself from liability. See Carmon v. Lubrizol Corp., 17 F.3d 791, 795 (5th Cir.1994) (insulating an employer from Title VII liability where an employer takes an employee's allegations seriously, conducts a prompt and thorough investigation, and immediately implements remedial or disciplinary measures).

FN8. Having reversed the jury's verdict in total, we need not address defendants' other points of error.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT FILED
JUN O 3 1996

No.94-20439

D.C. Docket No. CA-H-92-3240

VIRGINIA WELLER,

Plaintiff-Appellee
Versus

CITATION OIL & GAS CORPORATION, and
RALPH HOLLINGSHEAD,

Defendants-Appellants.

Appeals from the United States District
Court for the Southern District of Texas

Before GARWOOD, EMILIO M. GARZA and
DeMOSS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment in this cause is reversed and judgment is rendered in favor of the defendants.

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendants-appellants the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:

CHARLES R. FULBRUGE
111
CLERK

JUN 25
1996